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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

American College of
Otorhinolaryngologists
(formerly known as the American Board
of Otorhinolaryngology)

Petitioner.

v

American Board of Otolaryngology

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The American College of Otorhinolaryngologists respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled case.

QUESTIONS PRESENTED

1. Whether the "four corners" rule of U.S. v. Armour remains the governing rule of construction for consent decrees and, if not, whether under the present rule of construction a court can properly look to the professed purposes of one of the parties in order to construe a consent decree to include a prohibition of certain conduct where the prohibition is not specifically stated in the consent decree.

2. Whether a consent decree in a tradename infringement action (entered pursuant to a contested motion to enforce a settlement agreement) which perpetually enjoined certain actions, namely the use of the name American Board of Otorhinolaryngology, and did not require perpetuality as to other requirements, namely that the defendant-petitioner change its name to American College of

Otorhinolaryngologists, can be properly construed from within its four corners to require defendant-petitioner to perpetually operate under the name American College of Otorhinolaryngologists and to prohibit any future change of name without the approval of plaintiff-respondent where the consent decree does not specifically prohibit a future change of name or require plaintiff-respondent's approval for such a change.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	2
TABLE OF CONTENTS	4
TABLE OF AUTHORITIES	5
OPINIONS BELOW	7
JURISDICTION	7
STATUTES INVOLVED	8
STATEMENT OF THE CASE	9
REASONS FOR GRANTING THE WRIT	26
Introduction	26
1. The rules regarding construction of a consent decree require clarification.	27
2. The courts of appeal are in apparent conflict as to the rules of construction for consent decrees.	34
CONCLUSION	40
APPENDIX	A1

TABLE OF AUTHORITIES

CASES:	PAGE:
Eaton v. Courtaulds of North American, Inc., 578 F.2d 87 (5th Cir.1978)	36
Roberts v. St. Regis Paper Co., 653 F.2d 166 (5th Cir.1981)	35
Robertson Class Plaintiffs v. National Basketball Association 625 F.2d 407(2d Cir.1980)	37
Robinson v. Vollert, 602 F.2d 87 (5th Cir.1979)	36
United States v. Armour & Co. 402 U.S. 673 (1971)	17,28,29
United States v. Browning, 518 F.2d 714 (10th Cir. 1975)	36
United States v. ITT Continental Baking Co., 420 U.S. 223 (1975)	28,29,33,34
United States v. Western Electric Co.,Inc., 1981 Trade Cases Par. 64, 275 (D.N.J.1981)	36,37
Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981)	35

OTHER AUTHORITIES:

	PAGE
Conn.Gen.Stat. Sec. 33-396	22
Conn.Gen.Stat. Sec. 33-505	22
Conn.Gen.Stat. Sec. 10-330	14,20
Fed.R.Civ.P.65	34,36

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is unreported (per court restriction) and appears in the Appendix herein (pp. A1-A7). The unreported opinion of the U.S. District Court for the District of Connecticut appears in the Appendix herein (pp.A8-A13).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on October 26, 1982. A Petition for Rehearing was denied on December 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Conn.Gen.Stat. Sec. 33-396. Authority to transact business.

Conn.Gen.Stat. Sec. 33-505. Authority to conduct affairs.

Conn.Gen.Stat. Sec. 10-330. Authority to confer academic degrees.

The pertinent text of these statutes is set forth in the Appendix at pages A19-A20.

STATEMENT OF THE CASE

This case involves the construction of a consent decree in a tradename infringement action to determine if the decree perpetually enjoins petitioner-defendant (hereinafter "defendant") from changing its name. The lower court construed the decree to perpetually enjoin defendant from changing its name. Defendant contends that the lower court's construction has no basis within the four corners of the decree and that the lower court necessarily considered and relied upon the professed "purposes" of respondent-plaintiff in construing the decree, contrary to controlling precedent.

The parties are both professional groups of doctors specializing in the field of ear, nose, and throat. The plaintiff American Board of Otolaryn-

gology is a Missouri corporation and the defendant American College of Otorhinolaryngologists (formerly known as the American Board of Otorhinolaryngology) is a non-profit Connecticut corporation. Prior to this lawsuit, both parties certified doctors in the specialty field of ear, nose and throat.

In 1975, plaintiff brought suit against defendant alleging common law trade name infringement and basing federal jurisdiction upon diversity of citizenship and an amount in controversey exceeding $10,000.00. The complaint, however, did not allege money damages but sought a "permanent injunction to restrain Defendant, its agents, servants, employees, and associates from using the name American Board of Otorhinolaryngology, or any name confusingly similar to The American Board of Oto-

laryngology."

Settlement negotiations ensued and although no settlement agreement was ever executed by the parties, Judge Newman entered a judgment pursuant to plaintiff's Motion to Enforce Settlement Agreement thereby terminating the litigation. Defendant opposed motion on the basis that the settlement proposal was not accepted and on the basis of inequitable actions by members of plaintiff who had joined defendant's organization.

Defendant argued that an atmosphere of conflict of interest surrounded the settlement negotiations and, indeed, one of the two signatories to the purported corporate resolution accepting the settlement proposal was a member of plaintiff who resigned from defendant shortly after signing the resolution. There was also uncontroverted evidence that mem-

bers of plaintiff sat on defendant's board of directors and were officers of defendant during the time of the negotiations.

The judgment, (Appendix, pp. A14-A18), entered by the court was drafted by plaintiff and appended to its motion. Paragraph 3 of the judgment is the only paragraph containing an obligation that specifically continues in perpetuity, and provides that,

> defendant, its agents, attorneys, . . . are hereby perpetually enjoined and restrained from referring to defendant as the "American Board of Otorhinolaryngology", from issuing membership cards or certificates using such name, and from representing defendant to physicians, hospitals, the general public and others as the "American Board of Otorhinolaryngology".

Paragraph 5 of the judgment provided that "in accordance with the settlement agreement between the parties: (a) Defen-

dant will change its name to the 'American College of Otorhinolaryngologists'. . . . Defendant will also make the necessary changes in its corporation papers to reflect its change of name within said six-month period."

During the course of a subsequent contempt proceeding initiated by plaintiff before Judge Burns, defendant filed a motion to construe the consent judgment (entered by Judge Newman)requesting the court to construe the consent judgment to allow defendant to change its name to the "American Board of Head and Neck Surgery and Medicine". Defendant desired to change its name, inter alia, because the Secretary of State for the State of Connecticut would not allow defendant to change its corporate name to the name required by the consent judgment, i.e., American College

of Otorhinolaryngologists, because it had the word "college" in it. Connecticut state law, Conn.Gen.Stat. Sec. 10-330(e), provides that "no person, school or board, association or corporation shall use in any way the term . . . 'college' . . . unless the institution possesses a license from, or has been accredited by" the board of higher education. The board of higher education grants such licenses only to duly accredited institutions of higher learning. Defendant, being a professional association of doctors, is admittedly not an institution of higher learning and was therefore refused such a license.

Thus, defendant could not effectuate a change of name from American Board of Otorhinolaryngology (hereafter "ABO") to American College of Otorhinolaryngologists (hereafter "ACO") in its formal

corporate papers on file with the Secretary of State. Since the consent judgment enjoined defendant from referring to itself as ABO and since the Secretary of State refused to recognize the name ACO, defendant could not file the required biennial reports under either name. The biennial reports have still not been filed because of the lower court's refusal to allow defendant to change its name, but the Secretary of State has stayed the dissolution procedure pending the outcome of this appeal. Therefore, if the defendant cannot change its name, the defendant will be involuntarily dissolved by the Secretary of State for failure to file its biennial reports. Defendant does not want to be disolved, but wishes to remain a Connecticut corporation.

Plaintiff opposed the requested

change of name on the basis that the proposed name included the word "board" and plaintiff did not want defendant using the word "board" in its name. Plaintiff contended that the question of whether the proposed name was confusingly similar (or not) to plaintiff's name was irrelevant as defendant is required to use the name ACO by the judgment.

Plaintiff also contended to the lower court that "from the outset of this lawsuit, it has been clear to all that plaintiff's primary objection to defendant's name involved the use of the word 'Board'" and that "as the relief sought in the complaint and the whole course of the settlement negotiations illustrate, the goal of the agreement was to stop the defendant . . . from calling itself a certifying 'Board'."

In response, defendant argued that

plaintiff's contentions were merely (unsupported) statements of its "purposes" in the lawsuit and could not be considered by the court in construing the consent judgment under the rule of U.S. v. Armour, 402 U.S. 673 (1971), and, in any event, plaintiff's contentions were not supported by the record. The record showed that the relief sought in the complaint was not directed toward the descriptive term "board", but was directed toward the composite names of plaintiff and defendant. Neither factually nor as a matter of law did the complaint raise the issue of the term "board". The consent decree also contains no provisions related to the term "board" per se.

Defendant emphasized to the court that plaintiff's counsel had even admitted on the record that "this question

of 'Board' did not come up until later," later being after the date of the alleged settlement agreement.

Defendant's counsel at the time of the negotiations, Attorney DeLio, testified by affidavit that he did not discuss or agree upon any limitations on defendant's right to further change its name in the future nor did he discuss or agree upon any specific time duration for use of the name ACO. Specifically, he stated that,

> prior to the alleged date of the settlement agreement, i.e. March 11, 1976, I did not discuss (and did not agree upon) any time requirement or duration for the proposed change of name of defendant and I did not discuss (and did not agree upon) any limitation upon future changes of name by defendant. Such limitations and conditions were beyond the (then) scope of the negotiations and were never discussed.

The district court denied defendant's motion to construe and ruled that the

consent judgment requires defendant to operate under the name ACO and prohibits defendant from operating under any name other than ACO without the prior approval of the plaintiff and the court. Previously, the court had stated that "should defendant attempt to operate under any name other than ACO, without the prior approval of plaintiff and the court, the court will have no hesitation in finding defendant in contempt."

The lower court opinion appears to indicate that the court is purporting to construe the consent judgment from within its four corners and the opinion specifically atempts to disassociate a prior recitation of the "history of the relations of the parties" from the construction of the consent judgment. In ordering defendant to operate under the name of ACO, the court did not address

the apparent conflict this requirement generated with respect to the prohibition of Conn.Gen.Stat. Sec. 10-330(e) that "no . . . corporation shall use in any way the term 'college'. . . . " The court was thus ordering defendant, a Connecticut corporation, to perform an act which Connecticut state law prohibits.

Defendant appealed and the court of appeals affirmed the district court's construction of the consent judgment stating that,

> the consent decree at issue here specifically provides that the ABO will change its name to the ACO. The Court need not engage in sophisticated legal analysis to interpret the obligations arising from this provision. The ABO must change its name to the ACO and cannot again revise its corporate title unless it obtains a court order authorizing such a change. (citations omitted; emphasis in original).

In addition to the motion to con-

strue the consent judgment, defendant had also filed an alternative motion (also denied) to modify the consent judgment to allow a change of name based upon the dilemma in the State of Connecticut. Defendant contended that the requirement to change its name to ACO was illegal in the State of Connecticut and was impossible to perform, i.e., the Connecticut corporate entity can not so change its name as ordered. After misstating defendant's contention, the court of appeals then rejects the misstated contention for the reasons that "(1) the decree does not require the ABO to incorporate; and (2) the agreement does not bar the ABO from incorporating in another state."

It is respectfully submitted that these reasons do not logically relate to the undeniable factual contention that

defendant can not perform the required act as ordered. Additionally, the court of appeals is necessarily saying that the imminent dissolution of defendant as a Connecticut corporation is an acceptable result flowing from a proper interpretation of the consent judgment.

The court of appeals also stated that "the ABO has not produced any convincing evidence to suggest that it would be barred from transacting business in Connecticut if it incorporated in another state." The court did not however address the apparent impact of Conn.Gen.-Stat. Sec. 33-396 and Sec. 33-505 which require a foreign corporation to obtain a Certificate of Authority from the Secretary of State before it can lawfully transact business or conduct affairs in the State of Connecticut.

The defendant had pointed out the significance of these statutes in its Reply Brief on appeal.

Based upon the apparent possibility that the court of appeals may have overlooked the impact of these two statutes, defendant filed a Petition for Rehearing. To conclusively establish the impact of these statutes, a California corporation bearing the required name "American College of Otorhinolaryngologists" filed an Application for Certificate of Authority to transact business and conduct affairs in the State of Connecticut. The Secretary of State refused to issue a Certificate of Authority without a license from the board of higher education allowing the California corporation to use the word "college" in its name. Identically to the defendant, the California corp-

oration is not an accredited institution of higher learning and cannot obtain such a license. Consequently, the California corporation cannot obtain a Certificate of Authority to transact business and conduct affairs in the State of Connecticut. Accordingly, defendant as a foreign corporation could not lawfully transact business and conduct affairs in the State of Connecticut and still comply with the lower court's construction of the consent judgment.

Thus, contrary to the appellate courts' statement, evidence in the form of statutory law was produced by defendant and the subsequent action of the Secretary of State with respct to the California corporation conclusively confirmed the impact of the cited statutes. This significant confirmation of result was brought to the attention of the

court of appeals in a Petition for Rehearing supported by the affidavit of defendant's counsel. The court of appeals denied the Petition for Rehearing without comment.

Thus, the court of appeals affirmed the district courts' construction of the consent judgment which amounts to a perpetual restraint against any further change in defendant's name (since approval of plaintiff and the court is required as would be the case with any perpetual injunction). Neither court acknowledges any consideration of matters extrinsic to the four corners of the consent judgment.

Defendant contends that the district court must have necessarily considered matters extrinsic to the four corners of the consent judgment to reach its construction. The provisions of the con-

sent judgment do not specifically prohibit a change of name in the future. The judgment is simply silent as to a future change of name and is silent as to how long defendant is required to use the name ACO. The only perpetual injunction provided in the consent judgment is a perpetual injunction against the use of the name "American Board of Otorhinolaryngology."

Defendant also contends that in construing the consent decree, the district court considered plaintiff's professed statements of "purpose" as to the word "board" in defendant's name. No other basis has been identified by plaintiff or the court which can reasonably support the court's construction.

REASONS FOR GRANTING THE WRIT

Introduction

The rules regarding the construction

of consent decrees require clarification and this case is particularly well suited for the court to provide the needed clarification. The case presents a simplistic fact situation calling for the construction of a consent decree which, importantly, is comprised of plain simple language and does not contain any extraordinary words having a technical meaning nor does it incorporate any other documents. Moreover, the record is extemely limited and is comprised solely of documentary type evidence.

I. The rules regarding construction of a consent decree require clarification.

Despite two significant Supreme Court decisions dealing with the construction of consent decrees, further clarification of the rules of construction is needed. It appears that even among the

members of this Court, there is disagreement as to the import of these decisions.

In United States v. Armour Co., 402 U.S. 673, 682 (1971), this Court set forth the governing rule of construction that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it."

Approximately four years later in United States v. ITT Continental Baking Co., 420 U.S. 223 (1975), this Court divided five-four in again considering the basic law governing the construction of consent decrees. Although purportedly reiterating the four corners rule of Armour, the majority opinion sanctioned limited use of certain extrinsic aids to construction. The majority

stated that a reliance on such aids to construction "does not in any way depart from the 'four corners' rule of Armour." id. at 238.

Justice Stewart in dissent pointedly disagreed stating that,

> what the Court does today is to proclaim a new rule of construction for consent orders or decrees totally at odds with our previous decisions . . . .This novel approach, for which the Court cites not a single supporting precedent, is directly contrary to the 'four corners' rule of Armour";

id. at 247.

As noted in the succeeding section, the circuits are in apparent conflict as to the correct rule and its application for the construction of consent decrees. In this case, under its perception of controlling authority, the lower court with the sanction of the court of appeals has rewritten the consent judgment by interpretation to include prohi-

bitions not specifically agreed upon by the parties.

The present case presents a simplistic consent judgment having specific injunctive provisions somewhat analogous to the provisions in Armour together with the fact that the lower court must have necessarily considered the professed purposes of plaintiff in construing the simple language of the judgment. Within its four corners, the consent judgment perpetually enjoined defendant from using the name ABO. The consent judgment also acknowledged that in accordance with the settlement agreement defendant would change its name to ACO. The consent judgment is silent as to how long defendant must use the name ACO and it contains no prohibition against a future change of name. The only restriction on a future change of name

is that defendant is enjoined from using the name ABO, which restriction is a major portion of the relief originally sought by plaintiff in its complaint.

Therefore, what can be the lower court's basis "within the four corners" for requiring defendant to perpetually operate under the name ACO. The basis is not revealed in either the lower court opinion or the appellate court opinion. The lower court appears to state that the requirements are clearly set forth in the judgment while the appellate court sidestepped the issue and merely reiterated the lower court's result.

However, if one tests the court's construction by posing the simple question of "whether the language of the judgment on its face prohibits the defendant from changing its name from ACO to American Board of Head and Neck Sur-

gery and Medicine", the answer is clearly "no". Such a prohibition is simply beyond the scope of the specific language of the consent decree.

The lower court's interpretation could not have come from the negotiations between the parties. Defendant's attorney, Anthony DeLio, testified that he did not discuss or agree upon any restriction on a subsequent change of name or upon any time requirement for use of the name ACO.

Consequently, the lower court must have necessarily considered plaintiff's unsupported professed purposes in bringing the lawsuit. Notwithstanding the lack of basis in the specific language of the consent judgment and notwithstanding the conspicuous lack of support in the record for plaintiff's professed purposes, the lower court has held that

the consent judgment requires defendant to operate under the name ACO, a requirement that is contrary to Connecticut state law and which relegates defendant to legal extinction as a Connecticut corporation.

The dissent in Continental Baking predicted that certainity and reasonable reliance will no longer exist in consent decrees after Continental Baking and "there will be no apparent limit on the power of the judiciary to alter the plain language of an order. . . ." id. at 249. If the manifest injustice of the present decision remains intact, the prediction of the dissent will have been realized.

Moreover, in Continental Baking, the Court pointedly distinguished Armour and related cases stating that "we note that this case differs from Armour . . . in a

most important respect. . . . there is no possibility as there was in Armour . . . that respondent will be penalized for behavior not prohibited at all by the order 'within its four corners'." id. at 237 (citation omitted). In the present case, defendant is being penalized heavily for behavior not prohibited within the four corners. Such a result also appears contrary to the requirements of Fed. R. Civ. P. 65(d).

2. The Courts of Appeal are in apparent conflict as to the rules of construction for consent decrees.

In attempting to reconcile Armour and Continental Baking, the Courts of Appeal are in apparent conflict.

The Fourth Circuit apparently attempts to strike a middle ground between the two cases stating that from the two cases,

> we take two cardinal principles for interpreting the consent judgment here in issue. First, that its meaning is properly to be sought within the confines of the judicially approved documents expressing the parties' consent. Second, that its meaning is to be sought in what is there expressed and not in the way it might have been written if the plaintiffs established their full rights in litigation or if it had been written to satisfy the purposes of only one of the parties to it.

Willie M. v. Hunt, 657 F.2d 56, 60, (4th Cir. 1981). Thus, the Fourth Circuit looks to judicially approved documents apparently unrestrictedly.

The Fifth Circuit requires a surface ambiguity in the consent decree before allowing resort to extrinsic aids to construction. "Therefore, unless the decree is ambiguous, we must find the meaning of the decree in its language, without resort to extrinsic considerations." Roberts v. St.Regis Paper Co., 653 F.2d 166, 171 (5th Cir. 1981). Rob-

inson v. Vollert, 602 F.2d 87, 92 (5th Cir. 1979); Eaton v. Courtaulds of North America, Inc., 578 F.2d 87, 90-91 (5th Cir. 1978).

The Tenth Circuit appears to follow the Fifth Circuit. United States v. Browning, 518 F.2d 714 (10th Cir. 1975).

In the Third Circuit, a district court decision indicates that Continental Baking is not applicable to the construction of a consent decree because of the requirements of Fed. R. Civ. P. 65(d). In construing a consent judgment purusant to a motion to construe, the court stated that,

> note should be made too, that in ruling on the question that is presented, the court has kept in mind the strictures of Rule 65(d), that every injunction is to be specific in terms, and is to describe in reasonable detail the act or acts sought to be restrained and not by reference to the complaint or other documents. It is for that reason that decisions such as U.S. v.

> ITT Continental Baking Co., 420, U.S. 233 (1975) are not directly applicable. In that case there was an administrative, rather than a judicial, consent order, to which there were attached various documents which the consent order itself provided could be looked to. This is essentially an integration device rather than an incorporation by reference.

United States v. Western Electric Co., Inc., 1981 Trade Cases Par. 64, 275, at p. 74,216 (D.N.J. 1981).

The Second Circuit, as evidenced by the present case, appears to allow consideration of the parties' intent as in the interpretation of mere contracts. Accord, Robertson Class Plaintiffs v. National Basketball Association, 625 F.2d 407, 412 (2d Cir. 1980) ("we think the agreement must be construed in light of the litigation it settled").

Although citing Armour, the court's decision does not indicate any restriction by the "four corners" rule. In one

instance, the court ignored the clear language of the consent judgment to reach a contrary finding without explanation or apparent basis. Specifically, the court found that "the Board agreed to pay the ABO $3,000.00 and to withdraw the pending trademark action principally in exchange for the ABO's promise to change its name to the American College of Otorhinolargologists (ACO)." The consent judgment, however, specifically provided in Paragraph 5(d) that "in consideration for the assignment of rights referred to in Paragraph 4 (sic) above, plaintiff will pay defendant the sum of three thousand dollars ($3,000.00). . . ." Per the language of the consent judgment, the principal consideration for the payment of $3,000.00 was the assignment of defendant's federal and state trademark registrations as required by

paragraph 5(c) of the consent judgment, and not the defendant's promise to change its name to ACO.

In any event, there appears to be disagreement between the circuits as to the proper application of the rules of construction for consent decrees, just as the Continental Baking case revealed disagreement between the members of this Court as to the import of that case vis-a-vis Armour. There is now uncertainity as to the application of the proper aids to construction and as to the ultimate construction of a consent decree depending upon the particular circuit.

The continued value of consent decrees as an important and necessary vehicle for the termination of litigation will be enchanced by clarification of the rule of

construction. By such clarification, the Court would also be fostering the general federal judicial policy favoring the voluntary settlement of litigation.

CONCLUSION

Defendant's proposed construction of the consent judgment literally complies with the spirit and rule in Armour and does not cut against the Court's ruling in Continental Baking. Ironically, defendant's construction in no way jeopardizes the legitimate tradename rights of plaintiff. Plaintiff remains fully protected against tradename infringement by allowing the name requested by defendant. Likelihood of confusion is the sine qua non of trademark infringement and in no reasonable sense is the name "American Board of Head and Neck Surgery and Medicine" likely to be confused with

plaintiff's name "American Board of Otolarngology". These names are plainly dissimilar in sight, sound and meaning. Plaintiff's ojection to the word "board" is not related to its need for protection against tradename infringement.

The harm about to befall defendant is manifest and unnecessary. The harm could be avoided but for the lower court's confusion as to the proper application of controlling precedent.

For all of the foregoing reasons, we respectfully urge the Court to grant certiorari and to reverse the decision below.

Respectfully submitted

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FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26 day of October one thousand nine hundred and eighty-two.

PRESENT: HONORABLE J.EDWARD LUMBARD,

HONORABLE THOMAS J.MESKILL,

HONORABLE RICHARD J.CARDAMONE,

Circuit Judges

AMERICAN BOARD OF OTOLARYNGOLOGY,

Plaintiff-Appellee

v. Docket No.82-7195

AMERICAN COLLEGE OF OTORHINOLARYNGOLOGISTS (formerly known as American Board of Otorhinolaryngology),

Defendant-Appellant,

The defendant, American Board of Otorhinolaryngology (ABO), appeals from judgments dated May 29, 1980 and January 4, 1982 of the United States District Court for the District of Connecticut, Burns, J., construing an earlier consent decree

entered by Judge Newman on March 27, 1979.

This cause came on to be heard on the record of the district court and was argued by counsel.

The plaintiff-appellee, American Board of Otorlaryngology (Board), is a Missouri corporation which certifies physicians as specialists in otolaryngology (ear and throat) and is associated with the American Medical Association. The Board commenced a trademark infringement action against the ABO on October 1, 1975. The Board alleged that the ABO's name was confusingly similar to its own and therefore asked the court to order the ABO to change its name to avoid any unnecessary confusion.

The parties proposed during pretrial negotiations to settle their dispute through a consent decree. The Board agreed to pay the ABO $3,000 and to withdraw the pending trademark action principally in exchange for the ABO's promise to change its name to the American College of Otorhinolaryngologists (ACO). The proposed settlement was accepted by Judge Newman and a final judgment was issued on March 28, 1979 to reflect the agreement of the parties.

The Board commenced a contempt proceeding after the ABO failed to satisfy its obligations under the consent decree within the six month compliance period. A hearing was held on December 14, 1979, and the district court, after considering the pertinent evidence, made the following rulings on May 29, 1980: (1)

the consent decree affirmatively requires the ABO to change its name to the "American College of Otorhinolaryngologists"; (2) the ABO must obtain the plaintiff's consent and secure a court order before any further name changes will be permitted; (3) the defendant was in contempt of court for failing to comply with two specific provisions in the consent decree; and (4) the American Board of Otology, Rhinology and Laryngology (ABORL) was an entity "acting by or under the authority and control" of the defendant and therefore was bound by the terms of the consent decree. American Board of Otorlaryngology v. American Board of Otorhinolaryngology, 75 Civ. 241 (D.Conn.Jan. 4, 1980).

Subsequently, the defendant filed a motion to construe the consent judgment and an alternative motion to modify the judgment. Judge Burns denied both motions and entered the following order:

> 1. Paragraph 5(a) of the Final Judgment in this action, dated March 27, 1979, requires defendant to operate under the name "American College of Otorhinolaryngologists."
> 2. The American College of Otorhinolaryngologists (hereinafter "A.C.O.") and the American Board of Otology, Rhinology and Laryngology (hereinafter "A.B.O.R.L.") were or are entities acting by or under the authority and control of defendant within the meaning of paragraph 3 of the Final Judgment, and have been in active concert or participation with defendant within the meaning of Rule

> 65(d) of the Federal Rules of Civil Procedure, and the Final Judgment is therefore binding in its entirety upon the A.C.O., the A.B.O.R.L., their respective agents, attorneys, employees, servants, representatatives, successors and assigns, and any and all persons or organizations acting by or under their respective authority or control.
>
> 3. The Final Judgment prohibits defendant, its agents, attorneys, employees, servants, representatatives, successors and assigns, any and all persons acting by or under its authority or control, and any and all other entities and individuals bound by said Judgment pursuant to paragraph 2 above, from operating under any name other than "American College of Otorhinolaryngologists" without the prior approval of plaintiff and the Court.

J. App. 202. The ABO challenges each of those rulings.

A consent decree must be construed for enforcement purposes as a contract, United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975), and the scope of the decree must be discerned from within its four corners, United States v. Armour & Co., 402 U.S. 673, 682 (1971). The consent decree at issue here specifically provides that the ABO will change its name to the ACO. The Court need not engage in sophisticated legal analysis to interpret the obligations arising from this provision. The ABO must change its name to ACO and can-

not again revise its corporate title unless it obtains a court order authorizing such a change, see United States v. Swift & Co., 286 U.S. 106, 114-15, 119-20 (1932); Humble Oil & Refining Company v. American Oil Company, 405 F.2d 803, 812-13 (8th Cir. 1969).

The appellant's petition for modification of the consent decree was also properly rejected. Modification of a consent decree is appropriate only where the movants are "suffering hardship so extreme and unexpected" as to be regarded as 'victims of oppression.'" Humble Oil & Refining Company v. American Oil Company, 405 F.2d at 813. The appellant has failed to produce credible evidence of extreme and unexpected hardship. The ABO contends, however, that modification is necessary because it is impossible to incorporate in Connecticut using the name "American College of Otorhinolaryngologists." This argument is unpersuasive for two reasons: (1) the decree does not require the ABO to incorporate; and (2) the agreement does not bar the ABO from incorporating in another state. The ABO has not produced any convincing evidence to suggest that it would be barred from transacting business in Connecticut if it incorporated in another state.

The ABO also challenges the district court's earlier findings of contempt. The court imposed no sanctions on its contempt findings, however. Consequently, we have no jurisdiction to consider this issue on this appeal. See In re Irving, 600 F.2d 1027, 1031 n.1 (2d Cir. 1979); 15 C. Wright, A. Miller, &

E. Cooper, Federal Practice & Procedure, Sec. 3917 n.3 and accompanying text (1976 and Supp. 1981).

Finally, the ABO challenges the district court's decision to order the ABORL to comply with the terms of the consent decree. Judge Burns found that the ABORL was acting "by or under the authority and control" of the ABO and thus ruled that the ABORL also would be expected to adhere to the conditions outlined in the consent decree. The record fully supports this conclusion. Indeed, the evidence produced on this issue clearly indicated that: (1) the ABORL was created specifically because of the litigation between the ABO and the Board; (2) the officers and directors of the ABO and ABORL were almost identical; and (3) the ABORL's letterhead expressly noted that it was the successor corporation to the ABO.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

J.Edward Lumbard,
J.Edward Lumbard,U.S.C.J.

Thomas J.Meskill,per J.E.L.
Thomas J.Meskill,U.S.C.J.

Richard J.Cardamone,
Richard J.Cardamone,U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited

or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

AMERICAN BOARD OF OTOLARYNGOLOGY :

v : CIVIL NO. N75-241

AMERICAN BOARD OF OTORHINOLARYNGOLOGY:

RULING ON DEFENDANT'S PENDING MOTIONS AND PLAINTIFF'S PRAYER FOR RELIEF

The final judgment in this case (Newman,J.) adopted and enforced a settlement agreement between the parties which required, inter alia, that defendant change its nameto American College of Otorhinolaryngologists (ACO). On the basis of the evidence before this court on plaintiff's motion for contempt, the court found that the American Board of Otology, Rhinology and Laryngology (ABORL) was an entity acting by or under the authority of defendant, in effect, its alter ego or agent, a finding enhanced by de-

fendant's responses to plaintiff's discovery initiated in the remedy phase of plaintiff's motion for contempt. The court adheres to its view that ABORL is bound by the final judgment in this case. It is also clear from the actions of the American Board of Otolaryngology (ABO) on November 13, 1978, and ACO on November 16, 1978, that ACO is the agent of defendant and as such is bound by the final judgment.

Defendant has filed a motion to construe the final judgment and an alternative motion to modify the final judgment. This court found in its May 29, 1980, order that the final judgment required defendant to change its name to ACO and, as had previously been indicated by Judge Newman, any change in the settlement agreement adopted by the final judgment would have to be by agreement of the parties.

Settlement argeeements are "highly favored in the law and will be upheld wherever

possible." Pearson v. Ecological Service Corp., 522 F.2d 171 (5th Cir.1975). The court has the duty and the power to enforce the settlement which it approved and the settlement is to be construed according to principles applicable to contracts generally. Sanchez v. Maher, 500 F.2d 1105, 1108 (2d Cir. 1977). The court may not add terms to a settlement which were not in the contemplation of the parties. Florida Education Association, Inc. v. Atkinson, 481 F.2d 662, 663, (5th Cir. 1973). The integrity of the settlement agreement applies equally to an action based on trademark infringement as in any other litigation. Beer Nuts, Inc. v. King Nut Company, 477 F.2d 326 (6th Cir. 1973).

The settlement agreement, and the judgment, not only prohibited defendant from maintaining its then current name but affirmatively required a change of name to ACO.[1] This requirement is clearly stated within the

"four corners" of the agreement. Insofar as the court recited the history of the relations of the parties and the activities of defendant, ABORL and ACO, in its previous ruling, it did so, and gave consideration to those factors solely in the interest of whether a finding of contempt could and should be made.

Accordingly, the defendant's motion to construe final judgment and alternative motion to modify final judgment are denied and plaintiff's prayer for relief is granted.

It is hereby Ordered, Adjudged and Decreed:

1. Paragraph 5(a) of the Final Judgment in this action, dated March 27, 1979, requires defendant to operate under the name "American College of Otorhinolaryngologists."

2. The American College of Otorhinolaryngologists (hereinafter "A.C.O.") and the American Board of Otology, Rhinology and Laryngology (hereinafter "A.B.O.R.L.") were

or are entities acting by or under the authority and control of defendant within the meaning of paragraph 3 of the Final Judgment, and have been in active concert or participation with defendant within the meaning of Rule 65(d) of the Federal Rules of Civil Procedure, and the Final Judgment is therefore binding in its entirety upon the A.C.O., the A.B.O.R.L., their respective agents, attorneys, employees, servants, representatatives, successors and assigns and any and all persons or organizations acting by or under their respective authority or control.

3. The Final Judgment prohibits defendant, its agents, attorneys, employees, servants, representatatives, successors and assigns, any and all persons acting by or under its authority or control, and any and all other entities and individuals bound by said Judgment pursuant to paragraph 2 above, from operating under any name other than "American College of Otorhinolaryngologists"

without the prior approval of plaintiff and the Court.

4. The foregoing Order is entered without costs to plaintiff or defendant.

SO ORDERED.

Ellen Bree Burns
United States District Judge

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1 Defendant's claim that it cannot change its name to ACC under Connecticut law has a hollow ring and is unpersuasive in light of Dr. Schwartz' affidavit that defendant had elected to allow dissolution of the Connecticut corporation by forfeiture and defendant's subsequent belated attempt to effect the name change made only after a finding of contempt by this court.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AMERICAN BOARD OF OTOLARYNGOLOGY,	:CIVIL ACTION
Plaintiff	:NO.N75-241
VS.	:
AMERICAN BOARD OF OTORHINOLARYNGOLOGY,	:FINAL JUDGMENT
Defendant	:

It appearing to the Court that the parties have settled this matter, and plaintiff having moved for the entry of a final judgment in accordance with the settlement agreement, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. The Court has jurisdiction of this action and the parties. 28U.S.C. Sec.1332(a)(1).

2. "The American Board of Otolaryngology is a trade name belonging exclusively to plaintiff.

3. Defendant, its agents, attorneys, employess, servants, representatatives, successors and assigns, and any and all persons acting by or under its authority or control, be and the same are hereby perpetually enjoined and restrained from referring to defendant as the "American Board of Otorhinolaryngology", from issuing membership cards or certificates using such name, and from representing defendant to physicians, hospitals, the general public, and others as the "American Board of Otorhinolaryngology".

4. Defendant is ordered forthwith to advise its members of the permanent injunction entered herein and to ask each of its members to return to it any and all membership cards and certificates defendant issued bearing the name "American Board of Otorhinolaryngology".

5. In accordance with the settlement agreement between the parties:

(a) Defendant will change its name to the "American College of Otorhinolaryngologists". Within six months from the date hereof defendant will replace existing membership cards and certificates with new ones using the name "American College of Otorhinolarngologists". Defendant will use its best efforts to cause its members to return to it existing cards and certificates, although it is recognized that defendant cannot guarantee that all of its members will comply with such a request. Defendant will also make the necessary changes in its corporation papers to reflect its change of name within said six-month period;

(b) Plaintiff agrees and acknowledges that the name "American College of Otorhinolaryngologists" is not confusingly similar to plaintiff's name and

does not infringe plaintiff's name. Plaintiff also agrees that it will not claim any such confusion or infringement at any time in the future;

(c) Defendant will assign to plaintiff any and all rights it has to the use of the name "American Board of Otorhinolaryngology", including any trademarks registered with the United States Patent Office or with any state authorities;

(d) In consideration for the assignment of rights referred to in paragraph 4 above, plaintiff will pay defendant the sum of three thousand dollars ($3,000.00) upon receipt of a duly executed assignment of such rights and upon receipt of proof that defendant has changed its name, issued new membership cards and certificates to its members, and asked its members to return to it existing membership cards and certificates.

6. The foregoing judgment is entered without costs to plaintiff or defendant. Dated at New Haven, Connecticut, this 27 day of March, 1979.

(s) Jon O. Newman
United States District
Judge For the District of
Connecticut

STATUTES INVOLVED

Conn.Gen.Stat. Sec. 33-396.
Authority to Transact business.

(a) No foreign corporation except an insurance or surety or indemnity company shall transact business in this state until it has procured a certificate of authority so to do from the secretary of the state, and no insurance, surety or indemnity company shall transact business in this state until it has procured a license from the insurance commissioner in accordance with the provisions of Sec. 38-20.

Conn.Gen.Stat. Sec. 33-505.
Authority to conduct affairs.

(a) No foreign corporation except an insurance or surety or indemnity company shall conduct affairs in this state until it has procured a certificate of authority so to do from the secretary of the state.

Conn.Gen.Stat. Sec. 10-330.
Authority to confer academic degrees.

(e) No person, school, board, association or corporation shall use in any way the term "junior college" or "college" or "university" or use any other name, title, literature, catalogs, pamphlets or descriptive matter tending to designate that it is an institution of higher learning, or that it may grant academic or professional degrees, unless the institution possesses a license from, or has been accredited by, the commission, nor shall offer any program of higher

learning without approval of the commission for higher education.